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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

KENNETH W. DAY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY,
Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants Kenneth W. Day, Kenneth L. Desjardins, Jack A. Formet, Carl V. Field, Ronald C. Harper, Frank G. Mayzak, John L. Pickler, Robert V. Schupbach, Marvin Smith, L. W. Webb, Jr., Railway Labor Executives' Association, International Association of Machinists and Brotherhood of Locomotive Engineers appeal from the judgment of the United States District Court for the Southern District of California, Central Division, entered on September 13, 1965 (R. 399),[1] denying the prayer of appellants to annul, set aside, and declare void orders of the Interstate Commerce Commission, and submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the Southern District of California, Central Division, is reported at 246 F. Supp. 689. Its opinion and judgment are reproduced as Appendices A and B, *infra*, pp. 1a-9a. The reports and orders of the Interstate Commerce Commission have not yet been reported. They are reproduced as Appendices C and D, *infra*, pp. 10a-28a.

JURISDICTION

This suit was brought under Title 28, United States Code, Sections 1336 and 1337 (28 U.S.C.A., Sections 1336 and 1337), to set aside orders of the Interstate Commerce Commission (R. 2-20). The judgment of the District Court was entered on September 13, 1965 (R. 399), and notice of appeal was filed in that Court on October 13, 1965 (R. 412).[2] The jurisdiction of this Court to review the decision below by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following cases established the jurisdiction of this Court to review the judgment on direct appeal here involved. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156; *United States* v. *Drum,* 368 U.S. 370.

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[1] Reference is to the pages of the Record.

[2] The time for docketing the appeal in this Court was enlarged by the District Court to March 11, 1966 (R. 423, 429, 437).

QUESTIONS PRESENTED

This appeal presents the following questions:

1. Did the action of the Interstate Commerce Commission in denying a hearing requested by employees affected by the proposed merger of the Pacific Electric Railway Company into the Southern Pacific Company on (a) the issue of the merits of the merger and (b) the issue of what fair and equitable arrangements should be required to protect the interests of such employees violate due process requirements of the Fifth Amendment to the United States Constitution?

2. Did such employees properly invoke the question of their constitutional right to a hearing before the Commission on the merger application by their requests to that agency for a hearing which asserted (a) that the merger would result in loss of jobs for some of the employees, transfer of others to lesser paying or less desirable jobs, loss of seniority rights, and (b) that due process under such circumstances entitled them to a hearing on the merger application and their complaint to the District Court containing the same allegations?

3. Did the Commission have authority under the Interstate Commerce Act to deny the request of employees involved for a hearing on the issue of the merits of the proposed merger in circumstances in which the Commission concedes that, in the absence of such a hearing, it had no facts before it with respect to the impact of the merger on employees upon which to base the determinations and findings required by Section 5(2)(c) of the Act?

4. Did the Commission have authority under the Interstate Commerce Act to deny the request of employees involved for a hearing on the issue of fair and

equitable arrangements required to protect the interests of those employees, if the Commission approved the merger, in accordance with the mandate of Section 5(2)(f) of the Act, in circumstances in which the Commission concedes that, in the absence of such a hearing, it had no facts before it with respect to the impact of the merger upon employees?

5. Did the Commission have authority under the Interstate Commerce Act to deny the requests of employees involved for a hearing on proposed merger in the light of the provisions of Section 17(11) of that Act?

6. Are the orders of the Interstate Commerce Commission approving the merger in question invalid because of the Commission's admitted failure to make the determinations required by Section 5(2)(c) of the Interstate Commerce Act, imposing a duty on the Commission, in considering the merits of the merger, to weigh the interests of affected employees?

STATUTES INVOLVED

Sections 5(2)(b), 5(2)(c), 5(2)(f), and 17(11) of the Interstate Commerce Act (49 U.S.C.A., Sections 5(2)(b), 5(2)(c), 5(2)(f) and 17(11)) and the National Transportation Policy (49 U.S.C.A., preceding Section 1) are involved and are reproduced in Appendix E, *infra*, pp. 29a-31a.

STATEMENT

The orders of the Interstate Commerce Commission, which are the subject of this litigation, approved, without hearing, the merger of the properties and franchises of the Pacific Electric Railway Company (hereinafter called "PER") into the Southern Pacific Company (hereinafter called "SP").[3]

The SP owns and operates railroad properties over a large area of the western United States. Prior to the present merger, the PER owned and operated properties in the State of California. Both are carriers by railroad subject to Part I of the Interstate Commerce Act (49 U.S.C.A., Section 1, et seq.).[4]

On February 28, 1964, SP and PER filed an application with the Interstate Commerce Commission for approval pursuant to the provisions of Section 5(2) of the Interstate Commerce Act (49 U.S.C.A., Section 5(2)) of the merger of the properties and franchises of PER into SP (R. 22).[5] Such application stated that the effect of the proposed merger upon employees was not readily ascertainable in advance of the actual consolidation except that the ultimate result would involve the reallocation of work, with resulting force adjustments, including the displacement or transfer of employees (R. 9, 132). The application was assigned Finance Docket No. 23011 (R. 21).

The Commission agreed before the District Court that it is "a conceded fact" that the merger would produce some impact upon employees by adjustments of forces (Transcript of Proceedings before District Court, p. 29).

Therefore, on March 4, 1964, the Executive Secretary of the Railway Labor Executives' Association (hereinafter called "RLEA"), acting on behalf of the railway labor organizations affiliated with RLEA and their members employed by SP and PER, wrote to the Commission protesting approval of the merger and requesting that RLEA be advised of hearings thereon (R. 10, 132). On March 9, 1964, the Commission acknowledged the protest and inquired whether, if the merger was approved, RLEA would accept the so-called Oklahoma conditions to satisfy the requirements of Section 5 (2)(f). (R. 10.) This subsection imposes a duty on the Commission, as a condition of approval of any railroad transaction subject thereto, to "require a fair and equitable arrangement to protect the interest of the railroad employees affected".

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[3] Exhibit A to Complaint (R. 21-39); Exhibit B to Complaint (R. 40, 41); Exhibit C to Complaint (R. 42).

[4] R. 9, 25, 26, 132.

[5] A supplement to such application was filed on June 4, 1964 (R. 22).

On April 7, 1964, RLEA responded that the Oklahoma conditions were not acceptable and specifically requested the Commission to hold a hearing on the application (R. 10, 132). On April 13, 1964, counsel for RLEA sent an additional request to the Commission for a hearing setting forth the reasons therefor, including (1) general public interest considerations, (2) the adverse effects of the merger upon employees, and (3) the need to consider different employee protective conditions if the merger should be approved (R. 11, 42, 132). On April 22, 1964, the Commission advised RLEA that the request was being considered (R. 12, 132).

On September 30, 1964, the Commission (Division 3) issued a report and order approving the merger without granting the employees the requested hearing (R. 21-39).[6] The Commission gave no consideration to the impact of the merger upon employees as required by Section 5(2)(c) of the Interstate Commerce Act. It is the Commission's position that it has met its statutory obligation to employees if it provides employee protective conditions pursuant to Section 5(2)(f). (Transcript of Proceedings, pp. 28, 29.) Its order imposed the so-called Central of Georgia conditions for employee protection.

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[6] The Commission's report (R. 11-17) also dealt with and dismissed a complaint in Formal Docket No. 33872 filed by Switchmen's Union of North America that the PER and SP had previously merged without Commission approval in violation of the Interstate Commerce Act. Appellants were not parties to the complaint proceeding and the present litigation does not involve the Commission's action in Formal Docket No. 33872, but only its action in approving the merger application in Finance Docket No. 23011.

On October 13, 1964, RLEA filed a timely petition for reconsideration of the Commission's order.[7] This petition asserted (1) that the Commission's order would deprive employees of their jobs and place others in lower paying jobs as well as cause the relocation of many employees, thus certainly adversely affecting the seniority rights of many employees; (2) that the deprivation of the property rights of employees in their jobs and seniority without a hearing violated the constitutional rights of such employees to due process as well as their rights under the Interstate Commerce Act; (3) that the imposition of the employee protective conditions involved without hearing violated the provisions of Section 5(2)(c) and of Section 5(2)(f) of such Act, because the Commission did not, on the basis of the application, have before it the material facts necessary to fulfill its obligations under those statutory provisions; (4) that even if the Commission could dispense with hearings in a merger case in some circumstances, its findings were inadequate to do so in the present case; and (5) that the employee protective conditions imposed were inadequate and imposed without evidence to support their adequacy. It was pointed out that the adequacy of the conditions imposed was at that time the subject of litigation, *Railway Labor Executives' Association* v. *United States*

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[7] This petition is Exhibit E to the Complaint in the District Court (R. 46-60).

(Case No. 130, October Term, 1964, of this Court), and had been described by the United States to this Court as "so ambiguous and vague as to mislead all of the parties to the administrative and judicial review proceedings" in the Southern-Central of Georgia acquisition case in which they were first imposed.[8]

The petition, therefore, asked that the order of Division 3 approving the merger be set aside and that the merger application be set down for hearing at the earliest practicable date to afford the employees an opportunity to present evidence in suport of their position and to cross-examine the applicants' witnesses (R. 56, 57).

On July 8, 1965, the Commission (Division 3) served an order denying the petition of RLEA. The order contained no findings, but stated "that no showing has been made warranting reconsideration and hearing". The order further provided that the employee protective conditions previously imposed should include Sections 4, 5, and 9 of the Washington Job Protection Agreement (R. 42).

On August 10, 1965, the appellants, who include employees of PER, the RLEA, and two other railway labor organizations (International Association of Machinists and Brotherhood of Locomotive Engineers) filed their complaint in the District Court to invalidate the Commission's action (R. 2-20). The complaint alleged the basic facts set forth above, including the fact that the merger would result in loss of jobs for some employees, reduction to lesser paying or less desirable jobs for others, and damage to or loss of employee seniority rights, with the irreparable injury flowing therefrom (Paras. 12, 26, 27; R. 9, 14, 15.) It further alleged that (a) the Commission's refusal to grant the employees a hearing on the merger application denied them due process under the United States Constitution, (b) violated their statutory right to be heard both on the issue of whether the proposed merger was consistent with the public interest and should be approved at all and on the further issue, if it were approved, of what fair and equitable conditions should be imposed to protect the interests of adversely affected employees, and (c) was based on improper findings and not supported by substantial evidence (Paras. 2, 8-37; R. 15-18).[9]

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[8] Subsequently, this Court, on December 7, 1964, in a *per curiam* decision, remanded to the Commission its orders imposing employee protection in the Southern-Central of Georgia case for clarification insofar as such orders relate to the Washington Job Protection Agreement. 379 U.S. 199.

The appellants also filed a motion for a preliminary injunction and an application for a temporary restraining order (R. 61). The latter application was denied on August 11, 1965 (R. 127), and the merger was consummated on August 13, 1965 (R. 139).[10]

The statutory defendant, the United States, filed an answer to the complaint, stating that it "neither admits nor denies the allegations of the complaint", and that the "United States of America neither supports nor opposes the order of the Commission" (R. 397).

The Commission intervened in the case in the District Court (R. 342, 344) and appeared at the hearing before that Court in opposition to the complaint (Transcript of Proceedings, p. 28), but has not filed an answer to the complaint. The SP intervened in the case below and filed an answer to the complaint (R. 132).

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[9] At the same time, appellants filed an application for appointment of a three-judge court pursuant to Title 28, Sections 2284 and 2325 of the United States Code to hear and determine the complaint (R. 63). Such a Court was constituted on August 13, 1965 (R. 129).

[10] Appellants' motion for a preliminary injunction was merged into the hearing on the complaint held on August 22, 1965 (R. 120).

The decision of the District Court held that the Commission had a statutory right to approve the merger without a hearing and that the appellants had failed to sufficiently specify in the complaint how they would be injured to invoke a constitutional right to such a hearing (R. 405-408).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial questions concerning the rights of railroad employees affected by proposed railroad mergers to a hearing before the Interstate Commerce Commission on the issues raised by a proposed merger and the duties imposed upon the Commission with respect to consideration of the interests of such employees. These questions involve both constitutional and statutory requirements.

1. Constitutional Questions

Constitutional due process requires that administrative action adversely affecting personal liberty or property rights be taken after a fair hearing for the individuals whose rights are involved. *Morgan* v. *United States,* 304 U.S. 1; *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, modified 339 U.S. 908; *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U.S. 327; *Riss & Co.* v. *United States,* 341 U.S. 907; *Baltimore & Ohio Railroad Co.* v. *United States,* 298 U.S. 349, 368; *Norfolk and Western Railway Company* v. *United States,* 241 F. Supp. 974, 983.

In the present case, the employees involved were not granted any kind of a hearing by the Commission, and their repeated requests for a hearing, invoking their constitutional right thereto, were denied.

The District Court did not hold that the appellants were not entitled as a matter of constitutional right to a hearing on the application. Rather, the Court held that the complaint "does not set out or specify how or in what way plaintiffs have been injured" as a result of the Commission's approval of the merger (R. 406) so that they were not entitled to invoke such constitutional right (R. 406-408). It is respectfully submitted that the District Court erred in this finding.

In their communication to the Commission of April 13, 1964, reiterating their prior request for a hearing (R. 43), the employees pointed out that "the surviving carrier will be able to consolidate certain train crew operations to the economic injury to train and engine crews and maintenance of way employees, including signal crews". This communication also pointed out that all of the clerical employees "may be adversely affected to a greater or lesser degree depending upon the action by the surviving carrier to consolidate the presently separate office forces" (R. 44).

In their petition of October 13, 1964, again asking the Commission for a hearing (R. 46-60), the employees advised the Commission that the merger involved "would deprive certain employees of their jobs and place others in lower paying jobs as well as cause the relocation of many other employees. In doing this it will most certainly adversely affect the seniority rights of many employees" (R. 55). They further asserted to the Commission that "the deprivation of such personal and property rights cannot be accomplished constitutionally without the opportunity to be heard" and asked for a hearing to present evidence on these facts and to cross-examine witnesses for applicants (R. 55, 56). The Commission denied such request without any finding with respect to the employees' assertions (R. 42).

Paragraph 12 of the complaint alleged that the merger application showed that the ultimate result would involve the reallocation of work, with resulting force adjustments, including the displacement or transfer of employees (R. 9).

Paragraph 26 of the complaint alleged in pertinent part as follows: (R. 14)

> "* * * The merger will result in reallocations of work and readjustment of work forces which will bring about loss of jobs for some of these employees and transfer for others to lesser paying or less desirable jobs. The merger will thus have an adverse effect upon the employees and will result in irreparable injury to many of them. The Commission has refused to explore and receive evidence on the precise extent of this adverse effect although Section 5(2)(c) of the Interstate Commerce Act requires it to do so."

Paragraph 27 of the complaint reads as follows: (R. 15)

> "The plaintiffs have exhausted all of the administrative remedies available to them to obtain a hearing before the Commission on the merger and to be heard with respect thereto. Irreparable injury to the individual plaintiffs and to the employees of the Pacific Electric Railway Company similarly situated and represented by the Association will result if the Commission's orders are not set aside."

Paragraph 28 of the complaint reads as follows: (R. 15)

> "The Commission's action in approving the merger without hearing and without giving plain-

> tiffs a reasonable opportunity to intervene in the proceeding and be heard in opposition thereto and on the issue of employee protective conditions if the merger should be approved violated the rights of the individual plaintiffs and of the other employees of the Southern Pacific Company and the Pacific Electric Railway Company represented by the plaintiff Association under Amendment V to the United States Constitution by threatening and/or destroying the job and property rights of such employees without due process of law."

It is submitted that these allegations both to the Commission and the District Court were clearly sufficient with respect to the injury which would result to the employees involved from the merger to invoke their constitutional right to a hearing on the merger application.

The precise nature and extent of employee injury in railroad merger cases depends upon plans of applicants for effectuating the merger and the extent to which they consolidate operations and work forces. Normally merger applicants generally spell out such plans and the impact upon employees in their application, as they are required to do by the Commission, and then supplement this information by detailed exhibits and oral testimony at the hearing on the application. Such exhibits and testimony show, *inter alia,* the number of employees to be affected, the crafts or classes involved, the nature of the effect, i.e., dismissals; downgradings, transfers, the period when such effects will take place. The employees frequently produce their own exhibits and testimony based on the applicants' plans. In the present case, the application did not spell out the plans of the carriers with respect to employees on the basis of a claim that applicants could not ascertain such effects in advance of actual consolidation, but the application recognized that the ultimate result would involve reallocation of work, force adjustments, displacement and transfer of employees (R. 9, 132).

The Commission conceded to the District Court that there was nothing before the agency to show the impact on employees (Transcript of Proceedings, p. 29).

The employees, therefore, sought a hearing so that the extent and nature of this impact could be developed and measured by the Commission against the alleged public interest advantages of the merger as required by Section 5(2)(c) and for the further purpose of providing a factual basis for the Commission to meet the requirements of Section 5(2)(f) in the event it decided to approve the merger.

If the applicants had spelled out to the Commission in the merger application their consolidation plans and the effect upon employees, a hearing might not have been necessary depending upon the nature of the information supplied and whether balancing factors of the alleged public interest benefits were not open to question. However, when applicants chose not to provide such information, the rights of employees could be protected only by a hearing. The employees went as far as was possible under the circumstances to spell out the injury to be visited upon them.

In its original report approving the merger, the Commission stated (R. 24) that the "Railway Labor Executives' Association * * * has requested that the merger proceeding be set for hearing alleging that * * * consolidation of certain train operations and clerical forces would cause economic injury to the carriers' employees". The Commission did not dispute the accuracy of this allegation in its report and order (R. 21-39), nor did the Commission dispute the allegations of employee injury set forth in the petition of

October 13, 1964, again asking for a hearing (R. 46-60), when it rejected such petition (R. 42).

The employees did not present either to the Commission or the District Court any abstract question for adjudication, but a genuine controversy involving the rights of employees to a hearing on a major merger application of two Class I railroads, for the purpose of enabling the Commission to properly apply the statutory safeguards imposed by Congress for the benefit of employees in Sections 5(2)(c) and 5(2)(f).

The District Court opinion also appears to suggest that there could be no injury to employees entitling them to invoke their due process rights because the Commission imposed protective conditions under Section 5(2)(f) in its orders approving the merger. However, such conditions are not and were not intended to be a complete substitute for the jobs held by employees eliminated by a merger, so as to eliminate all injury to affected employees including destruction of seniority rights. They provide only compensation and other benefits for a limited period to alleviate the impact of the merger. Moreover, no protective conditions can fulfill the right of the employees to consideration of the merits of the merger in light of its impact upon employees. The Commission's action not only deprived employees of this right, but also of the right to have the protective conditions to be imposed, if the merger were approved, considered and determined in light of the actual facts.

2. Statutory Questions

Section 5(2)(b) of the Interstate Commerce Act requires the Commission to afford reasonable opportunity for interested persons to be heard on applications subject thereto. Section 17(11) of the statute provides that representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under Chapter I affecting such employees. Section 5(2)(b) requires the Commission to hold a public hearing on all cases subject thereto where railroads are involved unless the Commission determines that a public hearing is not necessary in the public interest. The District Court held that the Commission could properly dispense with a hearing in this case under the provisions of Section 5(2)(b) of the Interstate Commerce Act (R. 406).

In *Allegheny Corporation* v. *Breswick & Co.*, 353 U.S. 151, this Court held (page 173) that it did not need to determine the bounds of the Commission's power to dispense with, or limit, hearing under Section 5(2)(b), although the issue was there raised, because the party raising the issue was not an interested party within the meaning of the statute. The District Court correctly found in the present case that there can be no doubt that appellants are interested parties.[11] Thus, the present appeal presents the issue of whether in the circumstances of this case the statute authorized the Commission to deny the employees a hearing.

Section 5(2) of the Interstate Commerce Act recognizes the interest of railroad employees in proposed mergers in two ways. First, it provides in Section 5(2)(c) that in passing upon the merits of a proposed merger (or other Section 5(2) transaction) the Commission "shall give weight to the following considerations, among others * * *, the interest of the carrier employees affected". Second, the statute (Section 5(2)(f)) provides that the Commission, if it decides to approve a railroad merger, after weighing the statutory factors set forth in Section 5(2)(c), "shall require a fair and equitable arrangement to protect the interests of the employees affected".

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[11] There could be no question as to the correctness of this conclusion in light of Sections 5(2)(c), 5(2)(f) and 17(11) of the statute. *American Trucking Associations, et al.* v. *United States*, 355 U.S. 141 at page 144.

The representatives of the employees involved asked for a hearing on the merger application so that the Commission could have before it all the facts necessary to the fulfillment of the cited statutory obligations (R. 43, 46-60). Such a hearing was particularly required in this case since the application failed to spell out the extent and nature of employee injury (R. 9, 132).

It was impossible for the Commission to fulfill its statutory obligation under Section 5(2)(c) with respect to the merits of the proposed merger without the facts developed through such a hearing. As a consequence, the Commission did not even attempt to meet this obligation (Transcript of Proceedings, p. 28). It so conceded to the District Court, taking the position that it had done all that was required by imposing protective conditions under Section 5(2)(f). The statement of the Commission's position to the District Court reads as follows (Transcript of Proceedings, p. 28).

> "Mr. Goodman: May it please the court, my name is Leonard S. Goodman representing the Interstate Commerce Commission in this proceeding.
>
> "It is our first position that the Commission need make no specific findings concerning consideration of Section 5(2)(c) of the Act. This section specifies certain considerations that the Commission must bear in mind in passing upon a Sec-

> tion 5 transaction, merger transaction, and it is entirely sufficient that the Commission protect the employees against all eventualities, such protection as the Commission here found was adequate to protect the interests of the employees.
>
> "Now, no case holds that the effect on the employees, by itself, is enough to bar a transaction which is otherwise in the public interest. Here the interest of the employees was considered, and it was protected.
>
> "And when these conditions for their protection under Section 5(2)(f) are adequate, we believe that the interests of the employees are fully protected under Section 5(2)(c) and nothing further is required of the Commission."

The District Court's decision (R. 405-408) accepts the Commission position.

The Commission's argument and the District Court's decision are clearly in error. The requirements of Section 5(2)(c) relate to the Commission's consideration of the merits of a proposed merger and its determination to approve the merger. The requirements of Section 5(2)(f) relate solely to Commission action once it has determined to approve a merger. Contrary to the argument of the Commission, that agency has heretofore recognized the two separate obligations imposed upon it by the cited sections and pursuant thereto has disapproved Section 5(2) transactions after weighing the interests of employees affected. *Ft. Worth & D. C. Ry. Co. Lease,* 247 I.C.C. 119. In that proceeding the Commission disapproved a Section 5(2) transaction on the ground that the public benefits arising out of the proposal did not outweigh the injury which would result to employees. In so doing, the Commission spoke as follows with respect to the relationship between Section 5(2)(c) and Section 5(2)(f):[12]

> "*Conclusions.*—With respect to a transaction of this character, the Transportation Act of 1940 is specific as to matters that we must consider. In section 5 (2) (c), we are directed to 'give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the employees affected.' By subparagraph (f), we are directed as a condition of our approval, to 'require a fair and equitable arrangement to protect the interests of the railroad employees affected.' Our order must include such terms and conditions as will protect the employees of the carrier for 4 years from the effective date of our order from 'being in a worse position with respect to their employment.' By subparagraph (e), where, as here, the proposed transaction contemplates an assumption of fixed charges, our approval may be given only upon a specific finding that such assumption is not inconsistent with the public interest, and, where there is an increase of total fixed charges, we must find that such increase would not be 'contrary to public interest.'
>
> "Railroad organization consists of four important and indispensable factors, namely, land, labor, capital, and management. High specialization is necessary for each railroad factor. Whenever expert railroad labor is compelled to readjust and adapt itself to another industry, there is substantial loss to the individuals and to the general pub-

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[12] 247 I.C.C. 126, 127, 128.

> lic. Congress has recognized this fact and in revising the statute has specifically required us to give consideration to 'the interest of the carrier employees affected.' Heretofore, we have given consideration to the interest of the carrier employees affected to the extent of imposing appropriate conditions in our order of approval. See *Chicago, R. I. & G. Ry. Co. Trustees Lease,* 233 I.C.C. 21. We are now specifically required to give consideration to the interest of such employees in determining whether the transaction is consistent with the public interest. Under the proposed lease the future of any individual employee of the lessor would be uncertain.
>
> * * * * * *
>
> "We find that the applicant has failed to establish that the proposed transaction satisfies the requirements of section 5(2), (c), (e), and (f) of the amended act. An order will be entered denying the application."

Thus, the Commission rejects its own past interpretation and application of the statute by its present position.

In addition, the Commission says that it was not possible for it to make the determinations required by Section 5(2)(c), because the "plain fact of the matter is that there was nothing before the Commission to show the impact on employees" (Transcript of Proceedings, p. 29). This statement admits the truth of the allegations in the employees' requests to the Commission for a hearing that the Commission did not know what would happen to the employees upon approval of the merger (R. 57).

True the Commission argued to the District Court that this was so because the employees had not supplied such facts to the Commission (Transcript of Proceedings, p. 30) without explaining how this could be done without a hearing to develop such facts. Moreover, such contention ignores the fact that the statute imposes a duty on the Commission to determine what the impact was so that its obligation to consider the employees' interest could be met.

In this case, where the application failed to spell out the impact on employees, the facts necessary to the Commission's determination under Section 5(2)(c) could only be supplied by a hearing. The representatives of the employees had gone as far as they could in alleging injury and requesting the Commission to hold a hearing to determine its precise nature and extent (R. 42-60). The Commission's argument involves a curious use of its failure to explore and determine the facts as an excuse for not fulfilling its statutory obligation under Section 5(2)(c).

For the same reasons, the Commission's action under Section 5(2)(f) was deficient even if it be assumed *arguendo* that appropriate action under such section relieved the Commission of its statutory duty under Section 5(2)(c). The Commission statement to the District Court that there was nothing before the Commission to show the impact on the employees is an irrefutable concession that it acted under Section 5(2)(f) without regard to the facts which it could have ascertained by holding the hearing requested by the employee representatives.

Under these circumstances, the reliance of the Commission and the District Court (R. 405-408) upon the provisions of Section 5(2)(b) authorizing the Commission to dispense with a public hearing in some circumstances is wholly misplaced. The mere fact that the Commission made the statutory finding that "a public hearing is not necessary in the public interest" is meaningless in the present circumstances where the Commission concedes (1) that it did not make any findings under Section 5(2)(c) with respect to the employee interest and (2) that it did not have before it the facts with respect to the impact of the merger upon employees, when it denied the employees a hearing to develop those facts and to make it possible for the Commission to fulfill its statutory duty under both Section 5(2)(c) and Section 5(2)(f).

Moreover, it is clear that the Commission abused the authority conferred by Section 5(2)(b) to dispense with public hearings in appropriate cases entirely apart from the facts set forth above demonstrating that a hearing was necessary in this case. The legislative history of the provision in question shows that it was added to the statute to dispense with public hearings in railroad cases where "such cases are of minor importance".[18] A merger of two Class I railroads with thousands of employees (R. 9, 25, 26) can hardly be classified as "minor". In addition, Section 17(11) of the statute gives representatives of employees a right to intervene and "be heard in any proceeding arising under this chapter 8 and 12 of this title affecting employees". This right is absolute. *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Company,* 331 U.S. 519 (1947). A right to be heard embraces the right to present evidence and cross-examine witnesses. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company,* 227 U.S. 88, at page 93. In the present case, the Commission not only refused the request of the employees for such a hearing, but refused them a right to be heard in any manner on the two basic issues affecting their interest.

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[18] United States Code Congressional Service for the 81st Congress, 1st Session, 1949, Volume 2, pages 1640-1646.

The authority conferred by Section 5(2)(b) to dispense with public hearings could never have been intended to leave to Commission discretion the grant of the rights conferred by Section 17(11). Indeed, the Commission opposed the addition of Section 17(11) to the statute on the ground that it was unnecessary because the "Commission has never refused to hear representatives of carrier employees in any proceeding where they wish to be heard, and there is no danger that it will ever refuse". (House Report accompanying S. 2009 in the 76th Congress, 3rd Session.) Its present action shows that Congress wisely did not accept the agency's representations.

CONCLUSION

The appellants submit that this Court has jurisdiction of the appeal and that it presents substantial questions with respect to the constitutional and statutory rights of railroad employees of carriers affected by transactions before the Interstate Commerce Commission. Jurisdiction should be noted.

Respectfully submitted,

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March, 1966

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 65-1213-CC Civil

KENNETH W. DAY, ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, ET AL., *Defendants*.

Opinion

Per Curiam

This is an action to enjoin and set aside an order of the Interstate Commerce Commission of September 23, 1964. The Railway Labor Executives' Association, hereinafter referred to as Association, contends that the order was entered without a hearing, in violation of its statutory and constitutional rights. The order in question approved the merger of the Southern Pacific Company, hereinafter referred to as S.P., with the Pacific Electric Railway Company, hereinafter referred to as P.E., the latter being a wholly owned subsidiary. The plaintiffs are employees of P.E. They claim that their job and job security will be threatened by the merger of the two companies.

Jurisdiction of this court is predicated upon Title 28, U.S.C.A., Sections 1336 and 2325. The latter section requires a three-judge court for an interlocutory or permanent injunction restraining the operation or execution in whole or in part of any order of the Interstate Commerce Commission.

On February 28, 1964, the S.P. and P.E. filed an application pursuant to Title 49, U.S.C.A., Sec. 5(2). An order of the Commission approved and authorized a merger of the properties and franchises of the P.E. into the S.P. for the ownership, management, and operation of the properties which were then separately owned. Both applicants are carriers by railroad subject to the Interstate Commerce Act.

On March 4, 1964, the executive secretary of the Association wrote to the Commission asserting that, if a merger application were granted, it might well have an adverse effect upon the employees of the applicant carriers and entered their protest in opposition to the merger application. On March 9, 1964, the Commission wrote to the secretary of the Association acknowledging receipt of his letter of March 4, 1964, and advising that no public protest had been filed against the merger and inquiring whether, in the event there should be no public opposition, the Association would be satisfied with the imposition of the so-called Oklahoma conditions for the protection of employees as a condition of any Commission order approving the merger.

On April 7, 1964, the secretary of the Association wrote the Commission advising that the Association would not be satisfied with the imposition of the so-called Oklahoma conditions in the event the proposed merger was approved. The letter also urged that the Commission schedule a hearing to receive evidence.

On April 13, 1964, counsel for the Association wrote the Commission requesting that the merger application be set for hearing. The letter asserted that the merger would not be consistent with public interest and that there was no evidence demonstrating that the merger would result in no harm to employees of the railroads. The Association also asserted that the "Oklahoma conditions" did not meet the minimum requirements of Section 5(2)(f). On April 22, 1964, the Commission acknowledged receipt of the above-mentioned letter and advised that the request of the Association was being considered.

On September 30, 1964, the Commission issued its report and order approving the merger. The Commission found "in view of the lack of any opposition to the merger by public agencies, shippers, or other carriers we find that a hearing is not necessary in the public interest." The Commission imposed the same conditions for protection of employees as was previously imposed in "Southern Ry. Co.—Control—Central of Georgia," supplemented by the Washington Job Protection Agreement. The citations to both are hereinafter set forth.

The Commission's order, served September 30, 1964, provided that the merger would become effective on November 4, 1964. On October 13, 1964, the Association filed a petition for reconsideration of the report. It was urged that the order was issued without a hearing and a request was made that the merger application be set down for hearing at the earliest practicable time. On November 2, 1964, the Commission stayed the effective date of the merger pending disposition of the petition of the Association for reconsideration. On July 8, 1965, the Commission issued its order dated June 24, 1965, denying the petition for reconsideration. The order contained the following paragraph:

> "*It is further ordered,* That the authorization granted herein will be subject to the same conditions for the protection of railway employees who may be adversely affected as were imposed in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C. 377, including sections 4, 5, and 9 of the Washington Job Protection Agreement, see *Atchison, T. & S.F. Ry. Co. Merger,* 324 I.C.C. 254, 261 * * *"

The complaint herein alleges that the merger will result in reallocations of work and readjustment of work forces which will bring about loss of jobs for some of the employees and transfers for others to lesser-paying or less desirable jobs. ¶It is contended that the Commission's finding that a hearing was not required on the merger application is not supported by substantial evidence and is arbitrary and capricious.

The purpose of the Interstate Commerce Act, Title 49, U.S.C.A., Secs. 5(2), *et seq.*, was to permit two or more carriers to consolidate and merge their properties and franchises. Section 5(2)(b) provides that the Commission—

> "* * * shall afford reasonable opportunity for interested parties to be heard."

In the next sentence, it is provided:

> "If the Commission shall consider it necessary in order to determine whether "the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest."

In Section 5(2)(c), it is provided:

> "* * * In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: * * * (4) the interest of the carrier employees affected."

Section 5(2)(f) provides that, as a condition of its approval in a transaction involving carriers, the Commission—

> "* * * shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective

> date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment. * * *"

The plaintiffs contend that they are entitled to a hearing with the opportunity to present testimony and to cross-examine witnesses. The Commission resolved the matter by a finding that a hearing was not necessary in the public interest. The statute authorizes such a finding and we are precluded from setting aside such a finding if there is substantial evidence to support it.

Section 5(2)(b) provides that the Commission "shall afford reasonable opportunity for interested parties to be heard." Plaintiffs did not file protests as required by the rules[1] of the Commission but did correspond with the Commission. Plaintiffs' letters to the Commission contained general statements as follows: that the merger "might well have an adverse effect on the employees"; that jobs and job security will be threatened by the merger of the operations; that some 289 clerical employees "may be adversely affected"; that "the Oklahoma conditions do not meet the minimum requirements of Section 5(2)(f)."

There can be no doubt that plaintiffs are interested parties and that as employees they are protected under Section 5(2)(f). The Commission treated plaintiffs as interested parties and took steps to protect them. A public hearing was not granted to plaintiffs, but the Commission obviously did consider the matters set forth in the letters of plaintiffs. As a matter of fact, the Commission after reconsideration did add, among other things, sections of the Washington Job Protection Agreement to "Central of Georgia."[2]

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[1] Section 1.40(a) (49 C.F.R. § 1.40(a)) provides for the contents of a protest, and is as follows:

> "(a) *Content.* A protest against the granting of any application shall set forth specifically the grounds upon which it is made and contain a concise statement of the interest of protestant in the proceeding."

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[2] Excerpt From 317 I.C.C. 564: In principal substance, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions the provisions of the Washington Agreement, the protection afforded by the Oklahoma conditions *to be applied as a minimum.* The *Washington Agreement* affords benefits to employees for a maximum period of 5 years, depending upon the length of service, from the effective date of a coordination, but if an employee is displaced during the protective period he is entitled to an allowance equal to 60 percent, instead of 100 percent as under the Oklahoma conditions, of his average monthly compensation during the last 12 months of his employment. The New Orleans conditions were imposed for the specific purpose of giving protection to those employees who knowingly were not to be adversely affected in their employment until a substantial period elapsed after the date of the order authorizing the transaction and who otherwise would have received little or no protection under the Oklahoma conditions. (Italics supplied)

Excerpt From 320 I.C.C. 377-378: It was and is our intention that the protection afforded the affected employees is not limited to the protection set forth in appendix II, but that, as we stated in the first report, the protection afforded by the New Orleans conditions will be fair and equitable. 317 I.C.C. at 565-66. We thereby incorporated all the provisions of the New Orleans conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in appendix II.

It was our finding that employees adversely affected by the transaction in this proceeding were to be afforded the protection of all provisions of the Washington Agreement of May 21, 1936, which were not specifically modified by the provisions set forth in appendix II of our original report (317 I.C.C. at 588 et seq.).

The Washington Agreement was negotiated by collective bargaining between the contracting parties and, except as we have specifically done so (as, for example, section 2 of article II of appendix II to our original report in this proceeding), we have not in this or any prior proceeding superseded in any way that Agreement as a private contract. It follows that after January 9, 1967, when the protection under the conditions of appendix II ends, the terms of the Washington Agreement, if applicable, shall continue, It also appears from the proceedings before this court that the expertise of the Commission played an important part in the considerations underlying the issuance of the orders in question. The Commission had had considerable experience with mergers of this type.

Plaintiffs now assert in this court that they have been deprived of a constitutional right to a hearing before the Commission and that the Commission's findings were not supported by substantial evidence and were arbitrary and capricious. The findings were that no hearing was required and that the conditions imposed to protect employees met the requirements of Section 5(2)(f). The record before this court does not warrant this court in upholding plaintiff's contentions. When the allegations of the complaint are analyzed, they sum up to nothing more than general allegations of being deprived of a constitutional right to a hearing merely for the sake of a hearing, without specifying the particulars which made a hearing necessary.

The complaint here does not set out or specify how or in what way plaintiffs have been injured. This could have been easily done since the order of the Commission sets forth in detail the provisions which were made effective to protect employees. A reading of the Commission's order discloses that the protection provisions were most comprehensive, even to the point of providing for compensation for losses incurred in the sale of a home of an employee when that employee was transferred. It should also be noted that the Commission provided for compensation beyond the 4-year period required in the statute.

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since the labor protective conditions which we have prescribed in this proceeding do not supersede the Washington Agreement as a private contract.

The foregoing clarification of the labor protective conditions prescribed in our original report in this proceeding is equally applicable to subsequent orders issued under section 5 of the Interstate Commerce Act in which we have prescribed by reference the same labor protective conditions.

Certainly plaintiffs cannot insist that the Act was intended to permit a "job freeze." As was pointed out by the Supreme Court in *Maintenance Employes* v. *United States,* 366 U.S. 169, at page 176:

> "* * * the House conferees gave in explanation of the final version clearly reveal an understanding that compensation, not 'job freeze,' was contemplated."

Plaintiffs have not set forth facts showing any failure on the part of the Commission to comply with the requirements of Section 5(2)(f). That section requires that the merger shall not result in employees of the carrier or carriers "being in a worse position with respect to their employment." Certainly, if plaintiffs have been injured or placed in "a worse position" it could have been set forth in their complaint.

One who asserts that he has been deprived of a constitutional right or privilege is required to show that he has been injured before he has standing in court. (*Ashwander* v. *Valley Authority,* 297 U.S. 288.) As was pointed out by Mr. Chief Justice Hughes at page 324:

> "The judicial power does not extend to the determination of abstract questions."

As was pointed out by Mr. Justice Brandeis in a concurring opinion at page 347:

> "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation."

See also *Arizona* v. *California,* 283 U.S. 423.

A party is not entitled to challenge the constitutionality of an order unless he shows himself to be injured by its operation. In other words, unless he can show he has sustained, or is immediately in danger of, sustaining a direct injury as a result of that order, he is not entitled to invoke the judicial power. From the record before this court, it does not appear how or wherein plaintiffs will be damaged by the orders issued by the Commission; nor does the complaint set forth matters that warrant this court in annulling, setting aside, or declaring void the orders of the Commission or enjoining the enforcement thereof. In accordance with Rule 52(a) of the Federal Rules of Civil Procedure this opinion shall serve as findings of fact and conclusions of law.

Judgment will be entered accordingly.

DATED: September 13, 1965

STANLEY N. BARNES
United States Circuit Judge

CHARLES H. CARR
United States District Judge

JESSE W. CURTIS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 65-1213-CC Civil

KENNETH W. DAY, ET AL., *Plaintiffs,*

v.

UNITED STATES OF AMERICA, ET AL., *Defendants.*

Judgment

This cause having been duly heard on August 23, 1965, before the Honorable Stanley N. Barnes, United States Circuit Judge, the Honorable Charles H. Carr, United

States District Judge, and the Honorable Jesse W. Curtis, United States District Judge, and the Court having rendered and filed its written opinion, now, therefore, in accordance with said opinion,

It Is Ordered, Adjudged and Decreed that the relief sought by plaintiffs to annul, set aside, and declare void the orders of the Interstate Commerce Commission, and to enjoin the enforcement thereof, is denied.

Dated: September 13, 1965

Stanley N. Barnes
United States Circuit Judge

Charles H. Carr
United States District Judge

Jesse W. Curtis
United States District Judge

APPENDIX C

INTERSTATE COMMERCE COMMISSION
SERVICE DATE
SEPTEMBER 30, 1964

Finance Docket No. 23011[1]

SOUTHERN PACIFIC CO.—MERGER—
PACIFIC ELECTRIC RAILWAY CO.

Decided September 23, 1964

1. In Finance Docket No. 23011, merger of the properties and franchises of the Pacific Electric Railway Company into the Southern Pacific Company for ownership, manage-

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[1] This report embraces No. 33872, *Switchmen's Union of North America* v. *Southern Pacific Company et al.*

ment and operation approved and authorized. Conditions prescribed.

2. In No. 33872, upon complaint, found (1) that the properties of the Pacific Electric Railway Company, or any part thereof, have not been merged into the Southern Pacific Company in violation of section 5(4) of the Interstate Commerce Act, and (2) upon consummation of the merger proposed in Finance Docket No. 23011, the issues involving alleged violations of sections 5(1), 5(2), 6(1), 6(7), and 15(8) of the act will become moot. Complaint dismissed.

Lee Leibik and *Rita Davidson* for the complainant in No. 33872.

C. W. Burkett, Jr., William R. Denton, and *E. D. Yeomans,* for the defendants in No. 33872.

Clifton Hildebrand and *R. R. Gath* for intervener in No. 33872.

Alan C. Furth, Robert L. Pierce, Herbert A. Waterman, Eugene Garfinkle, and *E. D. Yeomans* for applicant in Finance Docket No. 23011.

Starr Thomas and *Frederick G. Pfrommer* for intervener in Finance Docket No. 23011.

Donald S. Beattie and *William G. Mahoney* for railway labor associations in Finance Docket No. 23011.

Report to the Commission

DIVISION 3, COMMISSIONERS TUGGLE, MURPHY AND WALRATH
MURPHY, *Commissioner:*

Exceptions and replies thereto have been filed to the hearing examiner's report and recommended order in No. 33872 by the Switchmen's Union of North America (complainant) and jointly by the defendants, Southern Pacific Company (Southern Pacific) and the Pacific Electric Railway Company (Pacific Electric). The matter was argued orally. Subsequent to oral argument, the defendants filed an application in Finance Docket No. 23011 seeking authority to merge the properties and franchises of the Pacific Electric into the Southern Pacific. Since this proposed merger affects the factual situation which gave rise to the basis of the complaint, disposition of the complaint proceeding separately would be impractical and we have recalled the merger proceeding from Finance Board No. 3 and consolidated it for decision with the complaint proceeding. Our conclusions in the complaint proceeding differ in some respects from those of the hearing examiner, but the ultimate conclusions herein make it unnecessary to discuss in detail the matters raised on exceptions. We adopt the statement of facts contained in the hearing examiner's report.

The merger proceeding.—By application filed February 28, 1964, as supplemented June 4, 1964, Southern Pacific and Pacific Electric request authority under section 5(2) of the Interstate Commerce Act to merge into the former the properties and franchises of the latter for ownership, management and operation. No representations with respect to the merger have been made by any State authority and neither complainant, who was notified of the pendency of the merger proceeding, nor any shipper has protested the proposed transaction.

The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) on June 8, 1964, filed a petition for leave to intervene in Finance Docket No. 23011 to seek conditions protecting present routings and interchanges between itself and Pacific Electric. Subsequently both Santa Fe and Southern Pacific agreed to the imposition of traffic conditions similar to those imposed in *Louisville & N. R. Co. Merger,* 295 I.C.C. 457; and *Erie R. Co. Merger,* 312 I.C.C. 185. The conditions agreed upon are essentially the same as the so-called standard traffic conditions imposed in

Detroit, T. & I. R. Co. Control, 275 I.C.C. 455. Santa Fe is permitted to intervene in Finance Docket No. 23011, and conditions will be imposed by reference in our order, as follows:

1. Upon consummation of the merger, Southern Pacific Company shall maintain and keep open all routes and channels of trade via existing junctions and gateways unless and until otherwise authorized by the Commission.

2. The present neutrality of handling traffic inbound and outbound by the Pacific Electric Railway Company shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of that carrier without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between the Pacific Electric Railway Company on the one hand and all lines connecting with its tracks on the other shall be continued insofar as such matters are within the control of the Southern Pacific Company.

4. Southern Pacific Company shall accept, handle and deliver all cars inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

5. Southern Pacific Company shall not do anything to restrain or curtail the right of industries, now located on the Pacific Electric Railway Company, to route traffic over any or all existing routes and gateways.

6. Any party or person having an interest in the subject matter may at any future time make application

> for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction shall be retained to reopen the proceeding on this Commission's own motion for the same purpose.

The Railway Labor Executives' Association (Association) has requested that the merger proceeding be set for hearing alleging that the merger would not be consistent with the public interest because both of the carriers involved are financially strong; many of the carriers' lines are parallel in Los Angeles, San Bernardino and Orange Counties, Calif., providing shippers with a choice of two carriers and this competition would be removed upon merger; and consolidation of certain train operations and clerical forces would cause economic injury to the carriers' employees. However, the financial strength of carriers involved in an application under section 5(2) of the act is not necessarily a bar to approval. Compare *Detroit, T. & I. R. Co. Control, supra,* page 489, and *Norfolk & Western Ry. Co. and New York, Chicago & St. Louis R. Co. Merger, Etc.,*— I.C.C. —, decided June 24, 1964. Inasmuch as the Pacific Electric has served principally as a feeder line for the Southern Pacific since its stock ownership was acquired by the latter carrier in 1911, it does not appear that any significant amount of competition exists between the two carriers. See *Pacific Electric Ry. Co.,* 215 I.C.C. 414, 418. See, also *Interstate Commerce Commission* v. *Baltimore & O. R. Co.,* 152 I.C.C. 721, 736, and 160 I.C.C. 785, 791-792. Accordingly, and in view of the lack of any opposition to the merger by public agencies, shippers, or other carriers we find that a hearing is not necessary in the public interest.

The Association alleges that employee conditions which have been imposed consistently in the past in this type of proceeding[2] do not meet the minimum requirements of section 5(2)(f) of the act in that these conditions contain insufficient fringe benefit protection. However, in our opinion adequate protection will be afforded by the conditions prescribed in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C. 377. Therefore, the conditions prescribed in the latter case will be imposed by reference in our order for the protection of railway employees.

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[2] These conditions are embodied in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177, and *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271.

The Southern Pacific was incorporated in Delaware on March 21, 1947. It acquired all of the rights and properties of a Kentucky corporation of the same name pursuant to our authority in *Southern Pac. Co. Reincorporation,* 267 I.C.C. 523. It owns or operates 11,290 miles of main and branch line trackage located in the States of Arizona, California, Louisiana, Nevada, New Mexico, Oregon, Texas, and Utah. Its outstanding capital stock consists of 27,141,366.3384 shares, without par value, of an aggregate stated value of $424,875,041. As of December 2, 1963, its stock was held by 82,128 shareholders.

The Pacific Electric was incorporated in California on September 1, 1911, and since that time has been continuously engaged in interstate and foreign commerce as a common carrier by railroad. It has 340,000 shares of outstanding capital stock with a par value of $100 per share all of which is owned by the Southern Pacific rendering the latter's control over the Pacific Electric direct and sole.

The Pacific Electric operates a total of 316 miles of trackage in the Los Angeles area of which 231 miles is classified as main line. Its principal points of interchange of freight traffic with the Southern Pacific are at Bassett, Carson, Colton, Los Nietos and Los Angeles; with the Union Pacific Railroad Company at Colton and Los Angeles; and with the Santa Fe at San Bernardino and

Los Angeles. The value of the Pacific Electric properties as of December 31, 1962, is shown to be $32,084,583.

The merger is one of a series undertaken in recent years by the Southern Pacific for the purpose of simplifying its corporate structure. See *Southern Pacific Co. Merger,* 312 I.C.C. 598, 600. Upon consummation of this transaction, the Southern Pacific will own directly and operate all of the properties of the Pacific Electric and will assume all of its obligations, including rights and obligations under various leases, operating contracts, and trackage agreements to which the Pacific Electric is a party. The annual savings resulting from the merger will aggregate approximately $500,000. These savings arise from simplification or elimination of certain state and federal regulatory reports and tax returns; the elimination of the maintenance of separate books of accounts for the Pacific Electric; and the elimination of computations of divisions between the Southern Pacific and the Pacific Electric together with simplification of these computations as they relate to other railroads. Consummation of this transaction will also eliminate difficulties in making the Pacific Electric properties available as security under Southern Pacific mortgages, will avoid the necessity for complying with competitive bidding requirements in transactions between the companies, and will terminate the necessity for leasing equipment from the Southern Pacific by the Pacific Electric all with resultant savings in costs to the Southern Pacific System.

A pro forma balance sheet, as of December 31, 1963, of the Southern Pacific giving effect to the merger with allowances for additions and eliminations, for information purposes only, is set forth in the Appendix hereto. As shown, the Southern Pacific proposes that the accounts of the merging subsidiary be carried over intact into the consolidated accounts of the parent. The accounting for the transaction will not be approved at this time but will be reserved for consideration upon submission of appropriate journal entries as required by our order herein.

The income accounts of the Southern Pacific for the years 1962 and 1963 show net income after fixed charges of $60,782,878 and $67,052,889; and those for the Pacific Electric during these same periods show income after fixed charges of $1,166,463 and $503,070.

The merger will be consummated in accordance with the terms of an agreement dated February 17, 1964, whereby all of the Pacific Electric's properties, easements, licenses and interests of every kind, rights, privileges, powers, and franchises, exemptions and immunities will be merged into the Southern Pacific. The title to all real estate or interest therein vested in the Pacific Electric will vest in the Southern Pacific and will not revert or be impared in any way by reason of the merger. The distribution of assets shall be in complete redemption of all the Pacific Electric's capital stock which is to be canceled upon consummation.

The Southern Pacific will assume liability for all contracts, deeds of trust, indentures, obligations of any kind, liabilities, and duties incurred by the Pacific Electric. The Pacific Electric has no outstanding bonded indebtedness and the obligations and liabilities being assumed by the Southern Pacific are not securities within the meaning of section 20a of the act and the latter carrier will not issue any new securities in connection with the merger.

The agreement is to become effective, after our approval, at midnight of the day on which it is tendered for filing at the respective offices of the chartering states of each carrier. At that time, the separate existence of Pacific Electric will cease; its outstanding capital stock will be canceled; and all intercompany debts and obligations will be discharged.

As more fully detailed in the discussion of the *complaint* proceeding below, in 1953, the Southern Pacific's foremost problem at Los Angeles was relieving the congestion at its Los Angeles Yard (Taylor Yard) which processed traffic destined to certain points in the area as well as that traffic passing through Los Angeles. Methods employed to relieve this congestion included the movement by the Pacific Electric of certain traffic destined to or originating from local points under arrangements devised in 1953 and 1954; the publication by the Southern Pacific of substitute service tariffs in 1960 under which the Pacific Electric would move traffic to or from points within the Los Angeles area for the Southern Pacific unless otherwise directed by the shipper; and the construction of certain by-pass lines. This problem and the methods used to alleviate it indicate the need for an efficient operation at Los Angeles. The merger, which will provide single corporate ownership, will afford more efficient utilization of facilities, equipment, and manpower as well as contributing to a more economical system operation as delineated above.

No extension of operation is involved and transportation service to public will be improved. The transaction will not result in any increase in total fixed charges and any assumption of fixed charges resulting therefrom will not be inconsistent with the public interest. No guaranty or assumption of payment of dividends is involved. No other railroad has requested that it be included in the merger.

The complaint proceeding.—Generally, this proceeding involves certain traffic arrangements and their implications by and between the Southern Pacific and the Pacific Electric on shipments from and to the east and north destined to or originated at Los Angeles, Long Beach or Los Angeles Harbor.

As noted above, the Southern Pacific's Taylor Yard at Los Angeles, prior to 1953, processed traffic passing through Los Angeles as well as that destined to or originated at Los Angeles, Los Angeles Harbor and Long Beach. To relieve the congestion causing delays in service at the Taylor Yard, in 1953 and 1954, the Southern Pacific began to move that traffic destined to or originated at Los Angeles, Los Angeles Harbor or Long Beach via the Pacific Electric through Los Nietos under bridging[3] agreements. At Los Nietos, the Pacific Electric assembled the cars according to destination and moved them over its own lines or tracks over which it had operating rights, to Los Angeles and Los Angeles Harbor through its various yards. These cars were handled with traffic received from other carriers normally moved by the Pacific Electric. The Southern Pacific agreed to pay to the Pacific Electric fees for each car moved ranging from $15 to $30 for traffic moving from and to the east. Commencing in 1959, traffic from the north to Los Angeles Harbor and Long Beach was moved by the Southern Pacific to Dolores, Calif., to further relieve congestion at Los Angeles. At Dolores, the Pacific Electric bridged these cars to destination. The Southern Pacific continued to carry some of its own local traffic between Los Angeles Yard and Los Angeles Harbor.

Also, in 1959, the Southern Pacific reorganized its Los Angeles terminal operation and switchmen began filing time claims alleging loss of work because of the bridging operations. To avoid additional time claims, the Southern Pacific began soliciting traffic to and from the Los Angeles area via "Southern Pacific-Pacific Electric" but was unsuccessful. To accomplish a similar result, effective in August 1960, the Southern Pacific published tariffs, to which the Pacific Electric is a party, providing that, unless the shipper shall direct otherwise, the Southern Pacific may, at its option, substitute service via the Pacific Electric between Los Nietos, Los Angeles, Los Angeles Harbor or Long Beach on traffic originating at or destined to points on the Southern Pacific, the Pacific Electric (Southern Pacific Lines) or connections. Under these and subsequent tariffs which, except for Dolores, Calif., expanded the points served outside of the Los Angeles area, the Pacific Electric receives a share of the joint rate. In March 1961, the Southern Pacific ceased operations under the bridging arrangements although these agreements were not formally terminated until August 30, 1963.

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[3] This term is used by the hearing examiner and parties to describe the movement of traffic and it carries no other technical or legal connotation.

By complaint filed September 5, 1961, as amended, under sections 13(1) and 13(2) of the act, the complainant alleges that:

(I) If the Southern Pacific and the Pacific Electric are independent carriers, the practice of routing Southern Pacific traffic over the Pacific Electric constitutes a division of traffic and pooling of service in violation of section 5(1) whether performed under the bridging arrangements or tariff provisions;

(II) Compensating the Pacific Electric under the bridging arrangements and not pursuant to a published tariff is in violation of sections 6(1) and 6(7) and the substitute service option in the tariff violates sections 6(1), 6(7), and 15(8);

(III) Even if the substitute tariffs are lawful, the Southern Pacific and the Pacific Electric are violating sections 6(1) and 6(7) because they do not adhere to the terms of the tariff;

(IV) The operations described above violate section 7 as they result in a backhaul on certain cars from the north;

(V) The Southern Pacific and the Pacific Electric have merged their properties or a portion thereof in violation of sections 5(2) and 5(4) because the latter has become a mere agency, department or instrumentality of the former and is used by the Southern Pacific to evade and violate the act and avoid existing legal and contractual obligations; and

(VI) The Southern Pacific in violation of sections 5(2) and 5(4) has leased or contracted to operate a part of the property of the Pacific Electric and has acquired control or management of the latter in a manner otherwise than through ownership of its stock.

The hearing examiner, by report and recommended order served August 6, 1963, concluded that:

(a) The arrangements whereby, pursuant to contract (bridging agreements) or under tariff provisions, the Southern Pacific at its option, unless otherwise directed by the shipper, moves traffic which was routed by the shipper over the Southern Pacific, via the Pacific Electric compensating the latter under contract rates through a share of the line-haul rates, provide for a pooling or division of traffic within the purview of section 5(1) and are unlawful because not approved by order of the Commission;

(b) The Pacific Electric did not observe its published tariffs, when it was compensated under contract rates for transportation of property moved on behalf of the Southern Pacific, in violation of section 6(7); and

(c) The tariffs, described above, to which the Southern Pacific and the Pacific Electric are parties, reserving to the Southern Pacific the privilege of moving the traffic, routed by the shipper over the Southern Pacific, via the Pacific Electric, unless otherwise directed by the shipper, violate sections 6(1) and 15(8) because they do not plainly state how the shipper can effectively exercise his right to route shipments exclusively by the Southern Pacific.

The hearing examiner's recommended order would allow 60 days from the effective date thereof for the defendants to cease and desist from the activities found to be unlawful.

On exceptions, complainant maintains in essence that the defendants are in reality one corporation; that this coordinated status of the carriers evolved without appropriate authority from this Commission; and therefore, employees affected thereby are entitled either to a cessation of the merged operation or to labor protective conditions as provided in section 5(2)(f). Defendants' exceptions attack the examiner's findings regarding the violations of section 5(1) pooling, 6(1) and 6(7) tariff provisions, and 15(8) the shipper's right to route his traffic where competing lines of railroad constitute portions of a through line or route. In their exceptions, the defendants filed a formal termination of the bridging agreements and revised the tariffs in question. The complainant moved to strike these portions of the exceptions. However, in view of our conclusion herein, no action on this motion is required.

In *Texas & N.O.R. Co. Merger,* 312 I.C.C. 147, 148, the Commission held that merger within the meaning of section 5(2) envisions "the complete absorption by a company of all assets and assumption of all liabilities of the liquidating company as of a given date, the dissolution of the latter and the cancellation of its capital stock". The hearing examiner found that Pacific Electric is a separate corporation; owns property; enters into agreements and conducts operation in its own name; files tariffs and reports to this Commission as a separate corporation; and, in general, has all of the legal and functional attributes of a corporate entity. As such, the hearing examiner found that no merger of the Pacific Electric has occurred and that complainant's allegations are not sustained. We agree with this conclusion of the hearing examiner and, accordingly, hold that the merger proposal herein has not been accomplished in any part.

Discussion and Conclusions. Upon consummation of the transaction proposed in the *merger* proceeding, the issues evolving from the complaint, the hearing examiner's recommended report, and the exceptions thereto will be rendered moot. The basis of the *complaint* proceeding is the relationship and arrangements which exist between the Southern Pacific and the Pacific Electric. The dissolution of the Pacific Electric as a corporate entity and the sole operation of its properties by the Southern Pacific conclusively and finally destroy the factual foundation upon which the complaint rests, and the Pacific Electric could not continue the alleged violations of the act. See *United States* v. *Oregon Med. Soc.,* 343 U.S. 326, 333, and compare *United States* v. *Trans-Missouri Freight Assn.,* 166 U.S. 290, *United States* v. *W. T. Grant Co.,* 345 U.S. 629, *Heflin* v. *Baltimore & O. R. Co.,* 278 I.C.C. 737, 739, and *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703, 715. In its reply to the defendants' exceptions, the complainant seeks a cure to preventing the recurrence of the same or similar practices and protection against future violations of a similar nature. Without deciding the merits of the complainant's allegations, nothing could accomplish these objectives as effectively as the authorized merger of the defendants. Similarly, also dissolved is the complainant's allegations that the defendants have accomplished a *de facto* merger and otherwise have violated section 5(4).

We are not unmindful that the foregoing results will occur only upon consummation of the merger authorized herein. The merger application reveals that the transaction has been fully prepared and awaits only our approval as a condition to accomplishment. We shall rely upon the involved carriers to promptly consummate their proposal and, consonant with this reliance, the order to be entered herein shall provide that unless consummation occurs within 90 days of the effective date, the order shall be of no further force or effect.

In Finance Docket No. 23011, we find that subject to the conditions for the maintenance of present routes and interchanges and for the protection of employees previously referred to, the merger of the properties and franchises of the Pacific Electric Railway Company into the Southern Pacific Company for ownership, management, and operation, as described herein, is a transaction within the scope of section 5(2) of the Interstate Commerce Act, that the terms and conditions proposed are just and reasonable, and that the transaction will be consistent with the public interest.

We further find, in No. 33872, upon complaint, that (1) the properties of the Pacific Electric Railway Company, or any part thereof, have not been merged into the Southern Pacific Company in violation of section 5(2) of the Interstate Commerce Act, and (2) upon consummation of the merger proposed in Finance Docket No. 23011, the issues raised by the complaint herein involving alleged violations of sections 5(1), 5(2), 6(1), 6(7), and 15(8) of the act will become moot, and the complaint, accordingly, will be dismissed.

An appropriate order will be entered.

APPENDIX

Constructed Balance Sheet as of 12/31/63, Giving Effect to the Proposed Merger

Assets	Southern Pacific	Pacific Electric	Additions and Eliminations	Giving Effect
Current Assets	$ 283,273,930	$ 3,919,645	Cr$ 4,947,117[1]	$ 282,246,458
Special Funds	12,117,179	7,590	—	12,124,769
Investments	191,352,980	1,101,462	Cr 60,574,432[2]	131,880,010
Properties Less Recorded Depreciation and Amortization	1,877,120,039	60,439,875	—	1,937,559,914
Other Assets	17,374,054	411,204	—	17,785,258
TOTAL ASSETS	$2,381,238,182	$65,879,776	Cr$65,521,549	$2,381,596,409
Liabilities and Stockholders' Equity				
Current Liabilities	$ 159,359,171	$ 6,053,928	Dr$ 4,947,117[1]	$ 160,465,982
Long-Term Debt Due within one year	31,617,864	—	—	31,617,864
Long-Term Debt Due after one year	707,099,050	68,730,753	Dr 94,879,144[3]	680,950,659
Reserves	15,022,676	623,783	—	15,646,459
Other Liabilities and Deferred Credits	24,729,239	2,714,445	—	27,443,684
Stockholders' Equity				
Capital Stock Issued	424,875,041	34,000,000	Dr 34,000,000	424,875,041
Discount on Capital Stock	—	Dr 6,350,500	Cr 6,350,500	—
Paid in Surplus	233,571	—	Cr 23,581,194[4]	23,814,765
Other Capital Surplus	56,230,352	—	Dr 1,519,615[5]	54,710,737
Retained Income—Unappropriated	962,071,218	Dr 39,892,633	Cr 39,892,633	962,071,218
TOTAL STOCKHOLDERS' EQUITY	1,443,410,182	Dr 12,243,133	Cr 34,304,712	1,465,471,761
TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY	$2,381,238,182	$65,879,776	Dr$65,521,549	$2,381,596,409

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[1] To eliminate various intercompany items of the merging companies.

[2] To eliminate book value of investments in stocks and investments advances in affiliated companies.

[3] To eliminate intercompany open accounts.

[4] Excess of par value stock of Pacific Electric over cost.

[5] Deficit of Pacific Electric at date of acquisition.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 23rd day of September, A. D. 1964.

Finance Docket No. 23011

SOUTHERN PACIFIC CO.—MERGER—
PACIFIC ELECTRIC RAILWAY CO.

No. 33872

SWITCHMEN'S UNION OF NORTH AMERICA

v.

SOUTHERN PACIFIC COMPANY ET AL.

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and said Division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the hearing examiner in No. 33872 are hereby made a part hereof:

It is ordered, That The Atchison, Topeka and Santa Fe Railway Company be, and it is hereby, permitted to intervene in Finance Docket No. 23011;

It is further ordered, That, in Finance Docket No. 23011, the merger of the properties and franchises of the Pacific Electric Railway Company into the Southern Pacific Company for ownership, management, and operation be, and it is hereby, approved and authorized upon the terms and conditions set forth in the report;

It is further ordered, That if the authority herein granted is exercised, Southern Pacific Company shall submit for the consideration of this Commission three copies of the journal entries required to record the transaction and shall confirm, in writing, to this Commission immediately after consummation of the transaction herein authorized, the date on which consummation has actually taken place;

It is further ordered, That when filing schedules making changes in tariffs required by the merger herein authorized, such schedules shall refer to this order by date and docket number;

It is further ordered, That the complaint filed in No. 33872 be, and it is hereby, dismissed; and

It is further ordered, That this order shall take effect and be in force from and after 35 days from the date of its service and that, unless the transaction authorized in Finance Docket No. 23011 is consummated within 90 days from said effective date, this order shall be of no force or effect.

By the Commission, Division 3.

HAROLD D. MCCOY,
Secretary.

(seal)

APPENDIX D

Order

SERVICE DATE
JULY 8, 1965

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 24th day of June, A. D. 1965.

Finance Docket No. 23011

SOUTHERN PACIFIC CO.—MERGER—
PACIFIC ELECTRIC RAILWAY CO.

Upon consideration of the record in the above-entitled proceeding, including the petition for reconsideration and hearing filed October 13, 1964, by the Railway Labor Executives' Association of the report and order of Division

3, dated September 23, 1964; and the reply thereto of the applicants; and

It appearing, That the material matters set forth in the petition have been considered by Division 3, and discussed in its report; that the decision is based on adequate findings supported by the record; that there has been presented no error of fact or law with respect to the matters complained of by the petitioner; and that no showing has been made warranting reconsideration and hearing:

It is ordered, That said petition, including request for hearing, be, and it is hereby, denied.

It is further ordered, That the authorization granted herein will be subject to the same conditions for the protection of railway employees who may be adversely affected as were imposed in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C. 377, including sections 4, 5, and 9 of the Washington Job Protection Agreement, see *Atchison, T. & S.F. Ry. Co. Merger,* 324 I.C.C. 254, 261; and

It is further ordered, That this order shall become effective 35 days from the date it is served.

By the Commission, Division 3, acting as an Appellate Division.

BERTHA F. ARMES,
Acting Secretary.

(seal)

APPENDIX E

Statutes Involved

Interstate Commerce Act (49 U.S.C.A.):

1. National Transportation Policy preceding 49 U.S.C.A., Section 1:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

2. Section 5(2)(b):

> "Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in

which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

3. Section 5(2)(c):

"In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

4. Section 5(2)(f):

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

5. Section 17(11):

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this Act affecting such employees."

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1086

KENNETH W. DAY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing a suit brought to set aside an order of the Interstate Commerce Commission. The Commission's order approved the merger of the Pacific Electric Railway Company and the Southern Pacific Company and provided for certain conditions protecting employees affected by the merger. Appellants are ten Pacific Electric employees and an association of executives of major railroad unions.

By an application filed February 28, 1964, and supplemented on June 4, 1964, Southern Pacific and Pacific Electric requested authority under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), to merge Pacific Electric's properties and franchises into Southern Pacific for purposes of ownership, management, and operation (J.S. 12a). Pacific Electric, which has been wholly owned by Southern Pacific since 1911, has served principally as a feeder line to Southern Pacific (J.S. 14a). The purpose of the merger was to simplify Southern Pacific's corporate structure and to permit continued close cooperation between the carriers for relief of traffic congestion at Southern Pacific's Taylor Yard in Los Angeles.[1] On

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[1] Prior to 1953, Southern Pacific traffic passing through or destined for Los Angeles was processed at the Taylor Yard. In order to relieve traffic congestion that had resulted in delays in service, Southern Pacific in 1953 and 1954 began moving this traffic via Pacific Electric (J.S. 18a–19a). In 1961, certain labor unions affiliated with the appellant union filed a complaint with the Commission charging that the carriers were separate companies operating in violation of the pooling and division of traffic provisions of the Interstate Commerce Act, 49 U.S.C. 5(1). Public hearings were held. The hearing examiner found that Pacific Electric and Southern Pacific were separate corporate entities and that existing arrangements for alleviation of traffic congestion at the Taylor Yard violated the pooling provisions of the Act. The Commission's order of September 23, 1964, approving the merger noted that since the complaint proceeding was based on the relationship between the carriers as separate entities, the approved merger would elimi-

September 23, 1964, the Commission approved the merger (J.S. 10a–25a).

By letter to the Commission of March 4, 1964, the Railway Labor Executives' Association (RLEA) protested the approval of the proposed merger and requested notice of any hearings "which may subsequently be arranged." It stated that, if approved, the merger "may well have an adverse effect on the employees of the [carriers] as well as employees of other railroad carriers affected." (RLEA App. 1.[2]) The Commission answered the letter, noting that no other protests had been filed and inquiring of RLEA whether certain conditions for the protection of affected employees would be satisfactory in the event no public hearing was held (RLEA App. 2).

On April 7, 1964, RLEA responded to the Commission's answer and "respectfully [urged] that the Interstate Commerce Commission schedule [a] hearing to receive evidence supporting our position in this matter" (RLEA App. 3). On April 13, 1964, RLEA again wrote to the Commission, stating that it considered a hearing imperative to determine whether the merger would be in the public interest, and arguing that, since both carriers were financially

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nate the factual foundation for the complaint and render the complaint proceeding moot, thereby permitting the cooperative arrangements regarding the Taylor Yard to continue in effect (J.S. 22a–23a).

[2] The record of proceedings before the Commission was not filed in the district court by appellants. Instead, they attached certain material as an appendix to their brief below, which we cite herein as "RLEA App."

strong, approval of the merger would not be in the public interest unless some public need was shown, or a demonstration made that no harm would result to the employees (RLEA App. 4). The Commission replied that the request would be considered (RLEA App. 5).

In the order approving the merger, the Commission addressed itself to the contentions of RLEA and ruled that a hearing would not be necessary in the public interest (J.S. 14a). The Commission imposed broad conditions for the protection of employees (J.S. 14a–15a), including protection against loss of wages, moving expenses, loss of fringe benefits, and loss on sale of homes. Subsequently, the Commission entertained a petition for reconsideration filed by RLEA, despite the fact that RLEA had not formally intervened, as required by the Commission's rules of practice. The Commission denied the petition, but its order of denial specifically incorporated Sections 4, 5, and 9 of the Washington Job Protection Agreement (an industry-wide collective bargaining agreement containing provisions protecting employees affected by mergers) in the conditions previously impos (J.S. 28a).

On appeal by the employees and the RLEA to the three-judge district court, the Commission's order approving the merger was affirmed. The court held in a *per curiam* opinion that the protective provisions were more than adequate and that no basis for a hearing had been shown (J.S. 1a–9a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The sole issue is whether the Interstate Commerce Commission properly determined that a public hearing on the merger of the Southern Pacific Co. with its wholly owned subsidiary, the Pacific Electric Railway Co., was unnecessary, when no public protest against the merger had been filed except by the employees involved and they had not specified any factual issues requiring a hearing. The Commission's order permitting the merger provides for the employees fair and equitable protective conditions which appellants do not question. In the circumstances, the district court's affirmance of the Commission's order was clearly correct.

Under the provisions of the Interstate Commerce Act dealing with railroad mergers, a full public hearing need not be held if "the Commission determines that a public hearing is not necessary in the public interest." Section 5(2)(b), 49 U.S.C. 5(2)(b).[3] Whether or not a hearing is held, the Commission must give weight, among other considerations, to "the interest of the carrier employees affected." Section 5(2)(c), 49 U.S.C. 5(2)(c). To this end, as a condition of its approval of a merger, the Commission must "require a fair and equitable arrangement" to protect the employees, including a condition that for four years after the effective date of the order they will not be in a worse position with respect to their employment than prior thereto. Section 5(2)(f), 49 U.S.C. 5(2)(f).

The Commission did not abuse its discretion in determining under Section 5(2)(b) that the public interest did not require a hearing in this case. When appellants indicated that they wanted a hearing, they were given ample opportunity to direct the Commission's attention to any facts and issues which they felt should be explored in a hearing. They presented no particulars, however, either on the merits of the merger or with respect to the Commission's obligation to "give weight" to the employees' interest, which demonstrated that a hearing was necessary.

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[3] In changing the prior law, which required a hearing in all merger cases, Congress determined that not all such cases have such importance as to necessitate a public hearing (H. Rep. No. 971, 81st Cong., 1st Sess., p. 3, attached as App. 6 to the Brief of Southern Pacific Company below).

Nevertheless, the Commission did carefully consider appellants' requests and adopted elaborate conditions (not challenged as inadequate or unlawful) for the protection of the employees. Appellants thus received the essentials of a fair hearing (albeit not an oral one) and their interests were fully protected. Due process requires no more. *Yakus* v. *United States,* 321 U.S. 414, 436; *Riss & Co.* v. *United States,* 117 F. Supp. 296, 304 (W.D. Mo.), affirmed, 346 U.S. 890; cf. *United States* v. *Storer Broadcasting Company,* 351 U.S. 192, 205. Nor have appellants any absolute statutory right to a hearing as labor representatives under Section 17(11) of the Act, which provides in general terms that employees' representatives "may intervene and be heard in any proceeding arising under the Act." They were heard, albeit not in a public hearing. There is no indication that Section 17(11) was intended to override the express language of Section 5(2)(b) which authorizes the Commission to dispense with unnecessary public hearings.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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April 1966.

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In the Supreme Court of the United States

October Term, 1965

No. 1086

Kenneth W. Day, et al., *Appellants*

vs.

United States of America, Interstate Commerce Commission and Southern Pacific Company,
Appellees

On Appeal from the United States District Court for the
Southern District of California

Motion to Affirm of Southern Pacific Company

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1086

KENNETH W. DAY, ET AL., *Appellants*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION and SOUTHERN PACIFIC COMPANY,
Appellees

On Appeal from the United States District Court for the
Southern District of California

Motion to Affirm of Southern Pacific Company

Appellee, Southern Pacific Company, moves that the judgment of the district court be affirmed, pursuant to Rule 16(1)(c) of the Rules of this Court.

STATEMENT

This direct appeal by appellants is from a judgment of a three-judge district court, which after hearing on August 23, 1965, denied the complaint of appellants to enjoin and set aside orders of the Interstate Commerce Commission approving the merger of Southern Pacific Company and its wholly-owned subsidiary, Pacific Electric Railway Company. The merger was consummated on August 13, 1965, following denial by U. S. District Judge Charles H. Carr, after hearing, of appellants' application for a temporary restraining order and motion for a preliminary injunction.

Southern Pacific's and Pacific Electric's application for authority to merge their properties and franchises under section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)) was granted by the Interstate Commerce Commission in *Southern Pacific Co. — Merger — Pacific Electric Railway Co.*, F.D. 23011, on September 23, 1964, without an oral, public hearing. The Commission's decision stated (J.S. 14a)[1]:

> "Accordingly, and in view of the lack of any opposition to the merger by public agencies, shippers, or other carriers we find that a hearing is not necessary in the public interest."

The Railway Labor Executives' Association (hereinafter referred to as RLEA), which is an appellant here, never formally protested or intervened in the Commission proceeding, as required by the Commission's General Rules of Practice, although it did correspond with the Commission. By its letter of March 4, 1964 (plaintiffs' brief (R. 345)[2], App. 1) it requested denial of the merger application and notice of hearing. On April 13, 1964, counsel for the RLEA wrote the Director of the Bureau of Finance of the Commission (plaintiffs' brief (R.345), App. 4) that:

> "Both of the applicants are financially strong railroad carriers and, therefore, it would not be consistent

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[1] "J.S." refers to Jurisdictional Statement.

[2] "R"—Refers to Transcript of Record in this court.

> with the public interest to grant the proposed application unless some public need is evidenced by the applicants or, at least, there is evidence which demonstrates that the merger would result in no harm to shippers or employees of the applicants."

This letter also stated that the "Oklahoma" conditions for the protection of employees, which had been suggested by the Commission, were not satisfactory. The RLEA pointed out that some adverse effects on employees might be delayed, "making the so-called 'New Orleans' conditions applicable." The RLEA stated that it "believes 'New Orleans' to be insufficient to meet the requirements of section 5(2)(f) because of the insufficient fringe benefit protection provided thereby." RLEA requested a hearing on the application "to determine its consistency with the public interest; the precise effect of approval upon shippers and employees; and to determine the conditions which should be imposed to meet the statutory minimum and to protect effectively the employees." (Underlining in original.)

The Commission's Report and Order of September 23, 1964 completely disposed of these contentions of RLEA (J.S. 14a):

> "The Railway Labor Executives' Association (Association) has requested that the merger proceeding be set for hearing alleging that the merger would not be consistent with the public interest because both of the carriers involved are financially strong; many of the carriers' lines are parallel in Los Angeles, San Bernardino and Orange Counties, Calif., providing shippers with a choice of two carriers and this competition would be removed upon merger; and consolidation of certain train operations and clerical forces would cause economic injury to the carriers' employees. However, the financial strength of carriers involved in an application under section 5(2) of the act is not necessarily a bar to approval. Compare *Detroit, T. & I. R.*

> *Co. Control, supra,* page 489, and *Norfolk & Western Ry. Co. and New York, Chicago & St. Louis R. Co., Merger, Etc.,*—I.C.C.—, decided June 24, 1964. Inasmuch as the Pacific Electric has served principally as a feeder line for the Southern Pacific since its stock ownership was acquired by the latter carrier in 1911, it does not appear that any significant amount of competition exists between the two carriers. See *Pacific Electric Ry. Co.,* 215 I.C.C. 414, 418. See, also *Interstate Commerce Commission v. Baltimore & O. R. Co.,* 152 I.C.C. 721, 736, and 160 I.C.C. 785, 791-792. Accordingly, and in view of the lack of any opposition to the merger by public agencies, shippers, or other carriers we find that a hearing is not necessary in the public interest."

On June 24, 1965, in denying RLEA's petition for reconsideration and request for hearing, the Commission made clear that the prescribed conditions provided the fringe benefit protection desired by RLEA, as it ordered (J.S. 28a):

> "*It appearing,* That the material matters set forth in the petition have been considered by Division 3, and discussed in its report; that the decision is based on adequate findings supported by the record; that there has been presented no error of fact or law with respect to the matters complained of by the petitioner; and that no showing has been made warranting reconsideration and hearing:
>
> *It is ordered,* That said petition, including request for hearing, be, and it is hereby, denied.
>
> *It is further ordered,* That the authorization granted herein will be subject to the same conditions for the protection of railway employees who may be adversely affected as were imposed in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320

> I.C.C. 377, including sections 4, 5, and 9 of the Washington Job Protection Agreement, see *Atchison, T. & S.F. Ry. Co. Merger,* 324 I.C.C. 254, 261 . . ."

Although the appellants have never made any showing that the merger of Southern Pacific and Pacific Electric is not meritorious, and have never indicated in what respect the protective conditions prescribed by the Commission are not adequate, they claim that the Commission erred in authorizing the merger and imposing the protective conditions without a hearing.

Appellants claim they are entitled to a hearing, notwithstanding that the Commission is expressly authorized by section 5(2)(b) of the Interstate Commerce Act (49 U.S.C. § 5(2)(b)) to deny a hearing if it finds, as it did here, that a hearing is not necessary in the public interest, and despite the fact the prescribed conditions for the protection of employees are identical to the most liberal ever ordered by the Commission.

ARGUMENT

I. The district court correctly concluded there was no violation of appellants' statutory or constitutional rights.

The Commission's denial of a hearing is expressly authorized by the 1949 amendment (63 Stat. 485) to section 5(2)(b). There has been no showing that the Commission abused its discretion to deny a hearing, as appellants have not shown they have been injured in any way, and consequently there has been no violation of appellants' constitutional rights.

It is clear that Congress intended to grant the Interstate Commerce Commission the power to decide without a hearing the kind of case presented here, i.e., a parent-subsidiary merger not substantially affecting the rights of the public.

In 1949, section 5(2)(b), which had required a public hearing in all cases where carriers by railroad were involved, was amended (63 Stat. 485) to permit the Commission to dispense with a public hearing if it "determines that a public hearing is not necessary in the public interest."

The 1949 hearings reflect the congressional intent. The Interstate Commerce Commission had supported such an amendment since 1947 (Annual Report of the Interstate Commerce Commission, 1947, Recommendation No. 3, p. 147). The transcript of hearings of May 3, 1949, before a subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives, on H. R. 1710, contains a letter of explanation to the Committee from the Commission which states (R.252, App. 4, p. 60 thereof):

> "Cases involving railroads are not invariably of such importance that a public hearing is necessary or desirable. Where such cases are of minor importance, this mandatory requirement causes unnecessary expense and delay. We believe that the Commission should have the same discretion as to holding a hearing in railroad cases as it has in those involving motor or water carriers. Section 3 of the bill would give it this discretion."

I.C.C. Commissioner Splawn testified at the hearings (R.252, App. 4, pp. 63-64 thereof) concerning the proposed amendment that a detailed application must be filed in section 5(2) cases, "from which the Commission can determine whether or not there is a prima facie case." He also testified the Commission had discretion whether to hold hearings in abandonment cases under section 1, paragraphs (18) to (21), of the Interstate Commerce Act.

Both the Senate Committee on Interstate and Foreign Commerce Report No. 82 on S.256, dated February 25, 1949 (R.252, App. 5, p. 65 thereof), and the Committee on Interstate and Foreign Commerce of the House of Representatives Report No. 971 on S.256, dated July 6, 1949 (R.252, App. 6, p. 68 thereof) adopt the Commission's explanation of the amendment to allow the Commission to dispense with a public hearing, and state that there was no serious objection to the bill and that it was "non-controversial."

The courts have upheld the Commission's authority to deny a public hearing where the Commission determines a public hearing is not necessary in the public interest:

> *O.C. Wiley & Sons v. United States,* 85 F. Supp. 542 (W.D. Va. 1949), *aff'd,* 338 U.S. 902 (1949);
>
> *Walker v. United States,* 208 F.Supp. 388 (W.D. Tex. 1962), *aff'd,* 372 U.S. 526 (involving proceedings under §§ 5 and 20a of the Interstate Commerce Act).

The Commission on numerous occasions has decided similar cases without a hearing.

> *Southern Pacific Co., et al. Merger, etc.,* 290 I.C.C. 818 (1955) [not printed in full];
>
> *Southern Pacific Co.—Merger—Central Pacific Ry. Co., etc.,* 307 I.C.C. 806 (1959) [not printed in full];
>
> *Southern Pacific Co.—Merger, etc.—Texas & New Orleans RR. Co.,* 312 I.C.C. 598, 599 (1961).

In *Allegheny Corp. Notes,* 307 I.C.C. 736, 741 (1959), the Commission stated succinctly why a public hearing should be denied where, as here, there is no controverted issue of fact:

> "As stated, intervener has requested that applicant's chairman of the board and president be required to support the application with the testimony under oath, subject to cross-examination, *but intervener described no evidence which he would produce if a hearing was assigned and alleged no facts which would justify such assignment.* In our opinion no hearing is necessary to enable us to determine our decision upon the application. Moreover, in view of the delay which would be occasioned by assignment of the application for hearing, and the probability that such delay would result in increasing the cost of the proposed financing and possibly endanger its successful completion prior to maturity of the outstanding notes, we are of the view that assignment of the matter for hearing is not justified merely to afford intervener an opportunity to cross-examine applicant's officers. Accordingly, the intevener's request for an oral hearing is denied." (Emphasis supplied.)

Appellants have never raised any issue of fact which could be resolved if a hearing were held, nor has it ever pointed to any defect in the Southern-Central of Georgia protective conditions, or suggested more satisfactory conditions. As pointed out by the district court in its opinion (J.S. 8a), the constitutionality of a statute or order cannot be attacked unless a party shows that he has been injured. *Ashwander v. Valley Authority,* 297 U.S. 288 (1936); *Arizona v. California,* 283 U.S. 423 (1931). Without such a showing, a hearing would be an idle act, nothing but "a hearing for the sake of a hearing."

II. Section 5(2)(f) does not require a hearing in order for the Commission to prescribe conditions for the protection of employees.

There is nothing in section 5(2)(f) of the Interstate Commerce Act (49 U.S.C. § 5(2)(f)) that requires the Commission to hold a hearing in order for it to determine what protective conditions should be prescribed. If Congress had intended to require hearings, it would have so stated. By the terms of section 5(2)(f) the Commission is required, in its order of approval, to include terms and conditions providing employees with four years' protection against "being in a worse position with respect to their employment," and it is clear that compensation, not a "job freeze", is required by this section. (*Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 175-78 (1961)). Prescription of the Southern-Central of Georgia conditions in this case by the Commission not only fully complied with the requirements of section 5(2)(f), but they were, as will be discussed *infra,* actually more liberal than were required.

A hearing could not possibly serve any purpose except delay, as the same protective conditions have been imposed in many merger and control cases, large and small, including:

Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (1962), 317 I.C.C. 729 (1963), 320 I.C.C. 377 (1964);

Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261, 288 (1962);

Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122, 199-204 (1963);

Detroit, T. & I. R. Co.—Control—Ann Arbor R. Co., 317 I.C.C. 619, 625 (1962);

Cambria & I. R. Co. Construction and Acquisition, 320 I.C.C. 43, 51 (1963);

Georgia-Pacific Corp.—Control, 320 I.C.C. 115, 120 (1963);

Boston & Maine Corp. Merger, 320 I.C.C. 290, 298 (1963).

If RLEA disputed the adequacy of these conditions, it could have specified in what respects additional protection was desired, but it never did so, either in its informal correspondence with the Commission, on petition for reconsideration before the Commission, or in this action.

Appellants' contention that the Commission had no facts before it with respect to the impact of the merger upon employees (J.S. 4) is not correct, as the Southern Pacific-Pacific Electric application for authority to merge, which was part of the record,[3] stated (p. 21):

> "The effect of the proposed merger upon employees is not readily ascertainable in advance of consolidation, except that the ultimate result will involve the reallocation of work, with resulting force adjustments, including displacement or transfer of employees to whom the provisions of section 5(2)(f) of the Interstate Commerce Act will be applicable."

Clearly there was adequate evidence in the record to sustain all the Commission's findings, including its finding that "a hearing is not necessary in the public interest." (J.S. 14a). The appellants have carefully avoided bringing this record before the court. Appellants therefore are in no position to question the adequacy of the evidence to support the Commission's findings. *Mississippi Valley Barge Line Co. v. United States,* 292 U.S. 282, 285-86

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[3] The Commission also had before it the record in Docket No. 33872, a complaint proceeding, which was consolidated for decision with the merger proceeding. The Commission recognized (J.S. 17a-18a) that "Southern Pacific's foremost problem at Los Angeles was relieving the congestion at its Los Angeles (Taylor) Yard which processed traffic destined to certain points in the area as well as that traffic passing through Los Angeles", and then found (J.S. 18a) "The merger, which will provide single corporate ownership, will afford more efficient utilization of facilities, equipment, and manpower as well as contributing to a more economical system operation as delineated above."

(1934); Rule 1.19 of the Commission's General Rules of Practice (49 C.F.R. § 1.19), which provides that the pleadings are evidence and constitute part of the record; Reporter's Transcript of Proceedings, August 23, 1965, pp. 29, 35 and 37.

Appellants have implied that the Commission might have had more information if a hearing had been held, but it is well established that the Commission is not required to determine the precise effect of a particular transaction upon employees before it may give its authorization and prescribe protective conditions. *Chicago, B.&Q.RR. Co. Abandonment*, 257 I.C.C. 700, 703 (1944). It makes no difference "whether 100 or 1000 employees are affected." *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169, 178 (1961).

The Southern-Central of Georgia conditions prescribed by the Commission are even broader than the conditions which the Commission was required to impose by section 5(2)(f). Instead of the four-year protective period required by the statute, the conditions actually imposed by the Commission in this case protect affected employees against loss of pay and fringe benefits for a maximum of five years, as they incorporate key provisions of the Washington Job Protection Agreement (J.S. 28a). The combined effect of the Southern-Central of Georgia conditions and the Washington Job Protection Agreement is to provide comprehensive protection against loss of pay and fringe benefits for five years through displacement allowances, dismissal allowances, payment of moving expenses and payment of losses on the sale of a home. These conditions also require the posting of 90-day notices by the carrier of changes in collective bargaining agreements, require collective bargaining with reference thereto, and require compulsory arbitration if the parties do not agree. *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 563-69, and Appendix II thereto.

III. The Commission's decisions and orders of September 23, 1964 and June 24, 1965 satisfy fully the requirements of section 5(2)(c).

Section 5(2)(c) of the Interstate Commerce Act (49 U.S.C. § 5(2)(c)) provides:

> "In passing upon any proposed transaction . . . the Commission shall *give weight* to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." (Emphasis supplied.)

Appellants contend that the Commission did not "give weight" to "the interest of the carrier employees affected." As stated above appellants cannot attack the findings in the absence of the record (*Mississippi Valley Barge Line Co. v. United States, supra*). Moreover, it is clear that the Commission did "give weight" to the interest of the employees. The Commission's decision of September 23, 1964 considered RLEA's contentions in its correspondence regarding the effect of the merger on the public interest, and answered each of the contentions of the RLEA (J.S. 14a), although the RLEA had not filed a formal protest or intervened. The Commission expressly mentioned the RLEA's allegation that certain protective conditions imposed in the past gave insufficient fringe benefit protection (J.S. 14a-15a), and it then found (J.S. 15a):

> "However, in our opinion adequate protection will be afforded by the conditions prescribed in *Southern Ry Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C. 377. Therefore, the conditions prescribed in the latter case will be imposed by reference in our order for the protection of railway employees."

The Commission also found, in its order of June 24, 1965 (J.S. 27a-28a) that the prescribed conditions included sections 4, 5 and 9 of the Washington Job Protection Agreement.

All that is required by section 5(2)(c) is that the Commission "give weight" to the interest of the employees, and there is nothing in this section which requires the Commission to hold an oral hearing. As we have noted in connection with section 5(2)(f), if Congress had intended that an oral hearing be held in every case it could easily have inserted appropriate language in section 5(2)(c), but it expressly provided to the contrary when it enacted the 1949 amendment to section 5(2)(b) which permitted the Commission to dispense with a public hearing if it is not necessary in the public interest. There is no conflict between the Commission's decision herein and *Fort Worth & D.C. Ry. Co. Lease,* 247 I.C.C. 119 (1941), as argued by appellants (J.S. 18). That case held that the Commission must "give weight" to the matters mentioned in section 5(2)(c), and that it may then deny an application filed under section 5(2). As we have pointed out, it is obvious that the Commission did "give weight" to the considerations set forth in section 5(2)(c), and no more specific findings are necessary. The ultimate finding for approval of a transaction under section 5(2) is whether it will be "consistent with the public interest". *Southern Ry. Co.—*

Control—Central of Georgia Ry. Co., 317 I.C.C. 557, 569, and this finding was made by the Commission (J.S. 24a).

Appellants' contention that the Commission must give more specific weight to the interest of affected employees is also answered by *Brotherhood of Maintenance of Way Employees v. United States,* 221 F.Supp. 19, 29 (E.D. Mich. S.D. (1963)), *aff'd,* 375 U.S. 216, in which it was held that the Commission had given adequate consideration to the interest of employees. The Court said (p.29) that mergers

> ". . . must inevitably have an impact upon the railroad employees. . . . We cannot say that the conditions imposed by the Commission do not adequately protect the rights of the employees in this situation."

IV. Section 17(11) of the Interstate Commerce Act does not require a hearing.

Section 17(11)(49 U.S.C. § 17(11)) provides that employee representatives "may intervene and be heard," but it says nothing about a public hearing. RLEA was "heard" as the Commission considered all the arguments made in the RLEA's letters regarding the merits of the merger and the nature of the protective conditions that should be prescribed. The RLEA was "heard" further when the Commission gave specific consideration to the RLEA's petition for reconsideration, and issued its order of June 24, 1965, which explained that the conditions for the protection of employees included sections 4, 5 and 9 of the Washington Job Protection Agreement (J.S. 28a). See *Riss & Co. v. United States,* 117 F.Supp. 296, 301, 304 (W.D. Mo. 1952), *aff'd,* 346 U.S. 895 (1953), (hearing requirement satisfied by consideration of pleadings). Moreover, the RLEA technically did not exercise its right to "intervene", in accordance with the Commission's General Rules of Practice.

Finally, section 17(11) was enacted as part of the Transportation Act of 1940 and it must be deemed to have been modified by the more specific 1949 amendment to section 5(2)(b), which authorized the Commission to dispense with a public hearing if it "determines that a public hearing is not necessary in the public interest."

CONCLUSION

This appeal does not present any substantial question concerning the constitutional or statutory rights of railroad employees. At no time have appellants indicated that any injury resulted to them from the prescription of the broad protective conditions provided by the Commission in its orders and decisions herein, and it must be concluded that in the circumstances here present a hearing would be an idle act on the part of the Commission, and that its findings find adequate support in the record. The judgment of the district court should be affirmed.

Respectfully submitted,

Charles W. Burkett
Herbert A. Waterman
Randolph Karr

Attorneys for Appellee
Southern Pacific Company

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—ss.

I, HERBERT A. WATERMAN, one of the attorneys for appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of April, 1966, I served copies of the foregoing document on counsel of record for all parties herein.

HERBERT A. WATERMAN

Subscribed and sworn to before me
this 15th day of April, 1966.

H. G. BUNN, JR.,
Notary Public
In and For the City and County of
San Francisco, State of California.
My Commission Expires June 25, 1967

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No. 1086

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

KENNETH W. DAY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, *Appellees*.

On Appeal From the United States District Court for the Southern District of California, Central Division

ANSWER OF APPELLANTS TO MOTIONS OF APPELLEES TO AFFIRM

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KENNETH W. DAY, ET AL., *Appellants,*

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, *Appellees.*

On Appeal From the United States District Court for the Southern District of California, Central Division

ANSWER OF APPELLANTS TO MOTIONS OF APPELLEES TO AFFIRM

The appellants, Kenneth W. Day, et al., pursuant to Rule 16(3)[1] of the Rules of this Court, submit the following answer in opposition to the motions of the appellees United States, Interstate Commerce Commission, and Southern Pacific Company to affirm the judgment below.[2]

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[1] The joint motion of the United States and of the ICC was received by the appellants on April 2, 1966. The motion of the Southern Pacific Company was received on April 18, 1966.

1. Constitutional Questions

The joint motion of the United States and of the ICC (page 6) contends that no substantial question as to the constitutional rights of the appellants and the employees they represent is presented because they received the essentials of a fair hearing. However, the "hearing" to which the joint motion refers was nothing more than a consideration of the application for approval of the Southern Pacific-Pacific Electric merger and the reasons advanced therein for its approval without any exploration of their validity and, in particular, without weighing the interests of the employees affected, as required by Section 5(2)(c) of the Interstate Commerce Act, or without consideration of any evidence as to whether the protective conditions imposed were in fact the equitable arrangements required by Section 5(2)(f) of the statute.

The Southern Pacific motion contends (pages 12, 13) that the Commission, in fact, did weigh the interests of the employees affected. However, counsel for the Commission, in the hearing before the District Court, conceded that the Commission did not do so (Jurisdictional Statement, pages 17, 18). The joint motion of the United States and the ICC seeks to glide over this point by citing the requirements of Section 5(2)(c) and then stating (page 5) that "To this end, as a condition of its approval of a merger, the Commission must 'require a fair and equitable arrangement' to protect the employees", thus obliquely endorsing the position of the Commission's counsel before the District Court that the Commission has met its obligations when it considers employee protection under Section 5(2)(f).[3] However, it is clear that the Commission does not discharge its obligations to employees merely by considering and acting on employee protective conditions, but that it has a further obligation, as it has always recognized and as the statute makes clear, of weighing their interests on the issue of whether or not the transaction should be approved, i.e. whether it is consistent with the public interest (Jurisdictional Statement, pages 18-20).

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[2] The joint motion of the United States and of the ICC (page 2) incorrectly states that appellants are the Railway Labor Executives' Association and employees of the Pacific Electric Railway. The appellants also include the International Association of Machinists and the Brotherhood of Locomotive Engineers, not affiliated with the Association.

Moreover, the Commission did not, in fact, give proper consideration to the issue of protective conditions under Section 5(2) because, as a result of its failure to conduct a hearing, it had no facts before it with respect to the impact of the transaction on employees (Transcript of Proceedings, page 28). The appellants do not perceive how it is possible to meet the requirements of Section 5(2)(f) without such facts.

Both motions to affirm contend that the employees were given ample opportunity by the Commission to direct attention to any facts and issues which should be explored in a hearing and that they failed to present any particulars. However, this argument attempts to place the burden on the employees of coming forward with facts which were wholly within the possession of the merger applicants and which were not divulged by their application as is ordinarily the case (Jurisdictional Statement, pages 13-15). The Commission had the duty to determine these facts and it did not discharge this duty. As its counsel admitted to the District Court, there was nothing before the Commission to show the impact on employees (Transcript of Proceedings, page 29).

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[3] Counsel for the United States in the hearing stated that "The Government doesn't intend to take a position in this case. Therefore, I wonder if I could be excused?" (See page 5 of Transcript of Proceedings.)

It is respectfully submitted that the denial of an evidentiary hearing to the appellants under these circumstances constitutes a travesty on the concept of fair play and gives rise to a substantial constitutional issue. In constrast, the Commission only recently on the application of the Southern Railway set down for rehearing the determination of the scope of employee protective conditions that should be imposed on the Southern's long since approved acquisition of control of the Central of Georgia, and thus will rehear the very conditions which it imposed in the present case.

2. Statutory Questions

Both motions to affirm rely on the grant of authority of the Interstate Commerce Commission under Section 5(2)(b) to dispense with public hearings on railroad merger applications upon a finding that such a hearing is not in the public interest. This Court has yet to determine the scope of the Commission's authority under that provision (Jurisdictional Statement, page 16). It was never intended to be used as an escape valve to avoid the obligations of Sections 5(2)(c) and 5(2)(f) as it was used in the present case. Moreover, prior to this case it was never used by the Commission to dispense with a hearing on a railroad merger case where such a hearing had been requested.

The Southern Pacific motion (page 7) argues that the Commission on numerous occasions has decided similar merger cases without a hearing. In none of the cited cases did the Commission deny a request of the employees for a hearing.[4] In prior proceedings where representatives of the employees have requested a hearing and this was the only request made, the Commission has granted the hearing. See: *Sacramento Northern Railway Trustees Abandonment,* 299 I.C.C. 73; *Chicago, St. Paul, Milwaukee & Omaha Ry. Co. Lease,* 295 I.C.C. 441.

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[4] The joint motion of the United States and the ICC (page 4) and the motion of the Southern Pacific Company (page 2) state that the employee representative, the Railway Labor Executives' Association, did not formally intervene in the merger proceedings as required by the Commission's Rules of Practice in spite of the fact that the Commission did not rely upon this point before the District Court and in spite of the further fact that Section 1.40(b) of the Commission's Rules do not require a petition to intervene to be filed prior to the time a proceeding is called for hearing and further provides that "failure to file a protest shall not prejudice subsequent participation in the proceeding". Moreover, the communications between the Association and the Commission were accepted by the Commission. They also show on their face that they were in accord with a well established procedure and that they were served on the carriers involved.

CONCLUSION

The appellants submit that the jurisdictional statement presents substantial questions for this Court's consideration.

Respectfully submitted,

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